

Reflection

The Judgments and Legacy of Nuremberg

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I. THE JUDGMENTS OF NUREMBERG: THE *MILCH CASE* AND OTHER DECISIONS

My words today are from the heart. Let me open my heart and share some memories and feelings with you, and along the way recount some happenings that were important not only to me but also to the history of mankind.

My road to Nuremberg began with a 1935 family discussion concerning the prevention of war. My father, who led the discussion, argued that stopping future aggression depended on effectively punishing the leaders who instigated war. I was further propelled on the road to Nuremberg by my wife, Betty. After my graduation from Yale Law School, I followed the then-traditional route to a Wall Street law firm. My wife, however, felt that there was more to life than the Wall Street practice of law.

"There's a world out there," she said, "and we ought to be part of it!"

I learned of such an opportunity one Sunday night in 1945, when a fellow Yale Law School graduate came to dinner. He was working at a New York law firm and doing very well. So I was surprised when he announced that he was joining the U.S. prosecution staff at Nuremberg. With my wife's total support and, indeed, prodding, I left no stone unturned in an endeavor to join him at Nuremberg. My efforts were eventually successful, and we sailed together from New York Harbor past the Statue of Liberty en route to Nuremberg in the late winter of 1946.

At Nuremberg I worked on the closing phases of the case against the German General Staff and High Command before the International Military Tribunal (IMT). The IMT was created pursuant to an agreement of August 8,

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1945 among the United States, the United Kingdom, France, and the Soviet Union. A charter annexed to the agreement defined the constitution, jurisdiction, and functions of the Tribunal, which was invested with power to try and punish persons who had committed war crimes, crimes against peace, and crimes against humanity. The German General Staff and High Command consisted of 130 high-ranking officers who served in the army, navy, or air force at some point between February 1938, when Hitler reorganized the armed forces, and May 1945, when Germany surrendered. They served under the High Command of the German Armed Forces, with Hitler as the supreme commander.

In the freewheeling atmosphere of Nuremberg, I thrived. I was above all a self-starter, and my training at the Yale Law School stood me in good stead. Yale taught me to think broadly and to ask the right questions. There were no assumptions in the Yale Law School world that I experienced, and this iconoclastic approach served me well at Nuremberg. Moreover, Nuremberg was new and fresh, and Yale had taught me how to grapple with new ideas.

For the General Staff and High Command case, my activities were of a research, writing, and support nature, and my role was secondary. That case, however, began to wind down in the late summer of 1946. Then, while only twenty-seven years old, I was given the opportunity to play an important role in the Subsequent Proceedings, a series of twelve trials held at Nuremberg in the American-occupied zone of Germany for the prosecution of war criminals not dealt with by the IMT.

I prepared cases against three German military leaders: (1) Walter von Brauchitsch, commander in chief of the German army; (2) Heinz Guderian, the father of modern tank warfare and chief of staff of the German army; and (3) Field Marshall Erhard Milch, State Secretary of the Air Ministry, Armaments Chief of the Air Force, and Hermann Goering's deputy head of the Luftwaffe. We had sought to convict the German General Staff and High Command as a group, but the IMT found that they were not a cohesive group despite the conspiratorial nature of their crimes. As a result, we took steps to try them individually.

Although I prepared cases against all three, we ultimately did not prosecute von Brauchitsch or Guderian. Von Brauchitsch was handed over to the British and sentenced to a long prison term. Guderian was to be transferred to the Poles, but after we were committed to the transfer a dispute with the Polish government prevented his getting any farther than Berlin. He was subsequently released and returned to his home in North Central Germany, where he helped form a neo-Nazi party.

The remaining target was Erhard Milch, who was one of Adolf Hitler's closest cohorts. With good support from analysts and interrogators, I prepared the case against him. Preparation meant organizing the case into a cohesive whole and developing points of focus. The *Milch Case* was ready for trial right on schedule in late 1946, which was fortuitous since the Subsequent Proceedings were about to begin and some of the judges already had arrived. Milch was served with an indictment on November 14, 1946. On December 20, he was arraigned and pleaded not guilty, and on January 2, 1947, the proceedings against Milch began.

Milch was charged with the use of prisoners of war in German factories in violation of the Geneva and Hague Conventions and with participation in the recruitment and exploitation of slave labor from the occupied territories and Nazi concentration camps. Indeed, a special aspect of the *Milch Case* was the charge that the defendant exploited the labor of 400,000 Hungarian Jews who were forcibly deported from Hungary at the close of World War II for work in the construction and operation of Germany's underground aircraft factories. Milch was appointed head of this program, which was known as the Jaegerstab (Fighter Staff), on March 1, 1944. Many of the slave laborers exploited by Milch and his cohorts died as a result of the harsh conditions under which they lived and worked. I was deeply involved in the preparation and presentation in court of this aspect of the *Milch Case*, which proved to be a significant factor in his conviction. I remember distinctly an admission I secured on January 13, 1947 from Xavier Dorsch, who played a key role in the implementation of the Jaegerstab: The program, which Milch headed, brutally victimized Hungarian Jews, who were forced to work under grueling conditions with scant clothing while provided rations of food that consigned most prisoners to starvation.

The Tribunal found Milch guilty on the slave labor count, and on April 17, 1947, sentenced him to life imprisonment. This sentence was notable because it was heavier than that given to Albert Speer, who was also accused of slave labor violations and who played a far more important role in the Third Reich. Milch thereafter appealed to the U.S. Supreme Court, which denied his appeal for a writ of habeas corpus on October 20, 1947. After the trial, Milch began serving his sentence at Rebdorf Prison outside Munich, but in 1952 his sentence was commuted by John J. McCloy, the High Commissioner of American-occupied Germany, to fifteen years, and in 1955 he was pardoned and released from prison, after serving two-thirds of his reduced sentence.

On the slave labor count, the IMT convicted Milch largely on the basis of his own violent words, taken from the records of three meetings: the Central Planning Board, where he and Albert Speer were the prime movers; the Fighter Staff meetings; and an armaments conference of air force engineers and chief quartermasters. The records revealed Milch's complicity in critical aspects of the slave labor program. At the March 25, 1944 meeting of the air force engineers, for example, Milch said that prisoners of war were not being treated with sufficient severity and that "[i]nternational law cannot be observed here."¹

Referring to prisoners of war he said:

If he has committed sabotage or refused to work, I will have him hanged, right in his own factory. I am convinced that that will not be without effect. . . . Gentlemen, I know that not every subordinate can say, "For me, the law no longer exists[]" . . . [I]f, moreover, you keep in touch and immediately clarify difficult points, so that something can be done, then we are willing to accept the responsibility, whether this is the law or not. I see only two possibilities for me and for Germany. Either we succeed and thereby save Germany, or we continue these slipshod methods and then get the fate that we deserve. I prefer to fall while

1. 2 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 822 (1949).

I am doing something that is against the rules but that is right and sensible, and be called to account for it, and, if you like, hanged, rather than be hanged because Papa Stalin is here in Berlin, or the Englishmen. I have no desire for that. I would rather die in a different way. But I think we can accomplish this task, too. We are in the fifth year of war. I repeat, the decision will come during the next six weeks!²

These statements were quoted in the prosecution's closing statement as evidence of the defendant's knowledge and intent. They played a crucial role in his conviction; indeed, they were quoted verbatim in Judge Musmanno's concurring opinion supporting the life sentence that Milch received.

Milch's remarks are important evidence of a top Nazi's state of mind regarding the law. There were many instances where Nazi officials showed that they knew the law but chose to violate it and go by their own self-defined rules that set no limits on their behavior. My experience in talking with Albert Speer, a key Nuremberg defendant, revealed that many of his fellow defendants knew that what they were doing was wrong when they committed their crimes. On the stand, however, they tried to justify their actions on the ground of superior orders, a defense that the Nuremberg Tribunal did not accept. Although superior orders could be considered a mitigating factor if the moral choice were not possible, they were unavailable as excuses for the actions of high-ranking Nuremberg defendants who willfully opted to be Hitler's henchmen.

Senator Robert A. Taft and others shed crocodile tears for the defendants at Nuremberg who complained that they were convicted of crimes that were not defined as such at the time of their commission. Taft condemned the IMT Nuremberg judgment on ex post facto grounds, arguing that it was born of the "spirit of vengeance" and that "[t]he hanging of the eleven men convicted [in the IMT trial] will be a blot on the American record which we shall long regret."³ Taft stated that "[b]y clothing policy in the forms of legal procedure, we may discredit the whole idea of justice in Europe for years to come."⁴ Taft ignored, however, that Milch and others consciously transgressed the law and told others to do likewise. Milch encouraged his subordinates to throw away the rule book and engage in behavior that was contrary to international law, including violations of the Hague and Geneva Conventions, to which Germany was a party. Other Nazi leaders, such as Wilhelm Keitel, Chief of Staff of the High Command of the German Armed Forces, carried out plans that they well knew violated international law. In *Milch* and similar cases, the Tribunal rejected the notion that Nazi policies could provide a defense to war criminals.

2. *Id.* at 822-24

3. Robert A. Taft, "Equal Justice Under Law", Address at Kenyon College (Oct. 5, 1946), in 13 VITAL SPEECHES OF THE DAY 44, 47 (1946).

4. *Id.* Taft's attack on the fairness of the IMT Nuremberg proceedings is at odds with the view of Dr. Theodor Klefisch, a member of the German defense team, who wrote: "It is obvious that the trial and judgment of such proceedings require of the Tribunal the utmost impartiality, loyalty and sense of justice. The Nuremberg Tribunal has met these requirements with consideration and dignity. Nobody dares to doubt that it was guided by the search for truth and justice from the first to the last day of this tremendous trial." Ra. Th. Klefisch, *Thoughts About Purport and Effect of the Nuremberg Judgment*, (Georg Grimm trans.), in NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS 201, 201 (Wilbourn E. Benton & Georg Grimm eds., 1955).

The *Pohl Case* involved Oswald Pohl and other SS defendants who used slave labor at factories and other enterprises near concentration camps. In it, the IMT reaffirmed the spirit of the judgment that it had rendered in the *Milch Case*. The outstanding feature of the Tribunal's judgment in the *Pohl Case* was its unqualified condemnation of forced labor irrespective of the physical conditions thereof:

Slavery may exist even without torture. Slaves may be well fed and well clothed and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation and beatings and other barbarous acts, but the admitted fact of slavery—compulsory uncompensated labor—would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.⁵

In the *Rasse und Sedlungshanptamt (RuSHA)*, or *Main Race and Resettlement Office Case*, SS defendants were convicted of implementing many features of the Nazi racial program, including the kidnapping of "racially valuable" children from the occupied countries for "Germanization," the forced Germanization of other foreign nationals who were considered "ethnic Germans," the forcible evacuation of foreign nationals from their homes in favor of Germans or ethnic Germans, and the persecution and extermination of Jews throughout Germany and German-occupied Europe. In a nutshell, *RuSHA* and other organizations weakened and eventually destroyed other nations while putting into effect the pernicious Nazi myth that the racial program could strengthen Germany territorially and biologically.

The defendants in the *Hostage Case* were generals indicted for war crimes committed in Yugoslavia, Albania, and Greece. This case addressed two issues: (1) whether "partisans" and "guerillas" were entitled to the rights of belligerents and were to be treated as prisoners of war when captured; and (2) whether it is ever lawful for an occupying power to execute hostages taken from civilian populations. Although it found most of the defendants guilty, the Tribunal upheld the right of an occupying power, under certain circumstances, to shoot hostages and deny partisans the status of belligerents.

In sum, the decisions in the *Milch Case* and the other cases I have described made an important contribution to the development of international law by implementing, in a variety of factual situations, the principles of the IMT judgment. The IMT in effect enunciated the following Nuremberg principles:

1. The initiating and waging of aggressive war is a crime.
2. Conspiracy to wage aggressive war is a crime.
3. The violation of the laws or customs of war is a crime.
4. Inhumane acts upon civilians in execution of, or in connection with, aggressive war, constitute a crime.
5. Individuals may be held accountable for crimes committed by them as heads of state.
6. Individuals may be held accountable for crimes committed by them pursuant to

5. Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, in INTERNATIONAL CONCILIATION 241, 295 (Carnegie Endowment for Int'l Peace No. 450, 1949) (quoting transcript of *Pohl Case*).

superior orders.

7. An individual charged with crime under international law is entitled to a fair trial.⁶

The cases discussed above, particularly the *Milch* and *Hostage* cases, illustrate the application of principles three and four above to individuals ranking in status just below the top Nazi hierarchy. The *Hostage Case* spurred the clarification and development of international rules relating to the taking and treatment of hostages, which were later clarified in the Geneva Convention of 1949 and its discussion of the treatment of civilians in wartime. The *Milch Case* also declared that high-ranking officials like Milch were not exempt from personal responsibility for their actions.

II. THE LEGACY OF NUREMBERG

Nuremberg represented the most impressive moral advance emanating from World War II, and it had lasting effects on the development of international law. First, Nuremberg held Nazi officials personally responsible for violations of international law, and correspondingly recognized that individuals had international human rights independent of nation-state recognition. This was a great leap forward in the evolution of a civilized world.

Second, and closely related, Nuremberg marked the real beginning of the international human rights movement because it was the first international adjudication of human rights. Its effect in this respect is felt today throughout the world in the United Nations' Universal Declaration of Human Rights, the American Convention on Human Rights and, above all, the European Convention on Human Rights and Fundamental Freedoms, which is a direct legacy of Nuremberg.

Third, the U.N. tribunal currently sitting at The Hague is trying individuals such as Dusko Tadic for crimes that are directly parallel to those adjudicated at Nuremberg. In fact, the Tribunal's current focus on crimes against humanity and war crimes is a clear inheritance of Nuremberg.

Fourth, Nuremberg principles governing the conduct of war are incorporated into the field manuals of the major powers. For example, as a result of the *Hostage Case*, the U.S. Army field manual now prohibits the taking of hostages and accords legal status to members of a resistance movement and to partisans.⁷ The Nuremberg principles also have been incorporated into the 1949 Geneva Convention governing the treatment of prisoners of war⁸ and the protection of civilians in warfare.⁹

Fifth, Nuremberg was the first postmortem analysis of a dictatorship. Through Nuremberg we learned the intimate details of the levers of power in

6. WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* 555-58 (1954). Mr. Harris was trial counsel on Justice Robert H. Jackson's staff at the Nuremberg trials.

7. See DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE*, paras. 11, 61(A)(2), 61(A)(6), 273 (Field Manual 27-10, 1956).

8. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

9. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

a functioning dictatorship. There were no checks and balances in the Third Reich, and its cataclysmic record attests to this fact. A free press and an independent judiciary, key elements in a system of checks and balances, did not exist in Adolf Hitler's Germany, and the consequences are graphically displayed in the record of Nuremberg.

Recent American history offers some vital illustrations of how a system of checks and balances can be effective. When President Nixon violated the trust of the American people in the Watergate conspiracy, it was the *Washington Post* that revealed his actions to the American public. The *Post* accounts of the Watergate conspiracy aroused Congress and the public to a point at which President Nixon was forced to step down and resign the office he had so persistently sought. In this process an independent judiciary served us well by lending judicial support to those who wanted to get at the facts.

When the United States was caught in the quagmire of Vietnam, the *New York Times* publication of the Pentagon Papers showed the American public the true facts about our role in the Vietnam conflict. The public's disillusionment eventually compelled President Nixon to pull out of Vietnam. During the Watergate and Vietnam crises, a vigilant press ensured the preservation of American liberty in the former and helped to extricate us from a war based on mistaken assumptions in the latter. In the case of Watergate, the *Washington Post* drew the attention of the public to the participation of a sitting president in criminal activity. In the case of the Pentagon Papers, the *New York Times* opened the public's eye to the real facts about Vietnam with eventual resultant policy consequences.

Suffice it to say that the foregoing could not have been revealed in the Nazi press in the era of Adolf Hitler. I cite these illustrations because they show the importance of a free press to a functioning democracy, where power eventually resides in the people and where public opinion usually prevails.

Our democracy here is pretty firmly in place. That is not so, however, with other countries. Through our postmortem analyses of the workings of power in Hitler's Third Reich, we can appreciate the importance in a democracy of a system of checks and balances. We can also recognize the critical role that a free press can play in informing a democratic public about the abuses of power by one branch of government, whether it be executive, legislative, or judicial.

Nuremberg can still leave an even greater legacy. Were we to remodel the Hague Tribunal into a permanent structure that would cover aggression as well, or were we to establish an international tribunal of universal jurisdiction that would deal with Nuremberg-type crimes, Nuremberg's legacy would be permanently institutionalized. Nuremberg addressed the Nazi situation, found Nazi leaders guilty of horrendous crimes, and made them pay the price. But Nuremberg has to be adapted in more generic form to cover modern situations. For example, if Saddam Hussein violated the Nuremberg principles, as he certainly did, then he should be called to account for such violations and punished accordingly. The same would be true of Pol Pot in Cambodia and of the Bosnian Serb leaders who ordered atrocities in Yugoslavia. If an international criminal court were established and transgressors brought to account for their crimes, this indeed would be a

warning sign to all others who were contemplating the commission of crimes in violation of the Nuremberg principles.

Nuremberg was right and just, but that was not enough to make it a permanent part of the international legal landscape. It was the product of a particular context in which the Allies held all the cards. The Allied military was out in force to support the Tribunal and to ensure the enforcement of the Nuremberg judgments. This was an ideal environment in which to implement the holdings of the Nuremberg courts. But this context, which was so favorable to the enforcement of the Nuremberg principles, did not remain in place after Nuremberg.

To preserve the Nuremberg principles, a permanent structure based on the Nuremberg model remains necessary. Such a structure, which would include both a statute setting forth the Nuremberg principles and a court to enforce it, needs to be established under U.N. auspices with the backing of the U.N. Security Council. This structure could be established through a convention, or, alternatively, through the conversion of the present U.N.-sponsored ad hoc tribunal at The Hague into a permanent court.

With the support of the U.N. Security Council, such an international criminal court would have strong credibility. We must stop the daily killings that occur despite the proscriptions of the Nuremberg principles. An international criminal court with full U.N. support is the best vehicle for doing so. Many thousands, even millions, of lives have been lost in Cambodia, Bosnia, and Rwanda because the international community has lacked the will and the mechanisms to enforce the Nuremberg principles. We must stop this useless madness by forgetting sovereignty concerns and establishing and supporting a strong international framework for the enforcement of the Nuremberg principles. In carrying out this endeavor we need a sense of extreme urgency so that we can halt the killing as soon as possible.

We have already waited too long to institutionalize Nuremberg. We need to build institutions that will enforce the international law established at Nuremberg—institutions that will outlast individual human lives and that will safeguard future generations. The alternative is to allow the current anarchy in international relations to continue with its Bosnias, Cambodias, and Kuwaits. If some sacrifice of sovereignty is involved, let me say once and for all: It is worth it—many times over. I think the Nuremberg court was fair to Milch and others of his ilk who knew at the time of their actions that they were breaking international law. The institutionalization of Nuremberg and the enforcement of a regime of international law would serve as a warning to those considering violations of international law. It would remind them that they must face the consequences of actions that violate international law.

The *Milch*, *Pohl*, *RuSHA*, and *Hostage* cases provide support for my proposal to institutionalize Nuremberg. The *Milch Case* held that Milch violated international law by enslaving thousands of innocents. German law gave him no absolution at Nuremberg. In the *Hostage Case*, the Tribunal found that the convicted generals violated international law in their handling of hostages. The same is true of the defendants in the *Pohl* and *RuSHA* cases. In the *RuSHA Case*, the defendants were held criminally responsible for the

many features of the Nazi racial program. In the *Pohl Case*, the Tribunal condemned, without qualification, forced labor irrespective of the physical conditions thereof. Although German law might be construed to sanction their actions, it afforded no defense to those in the dock at Nuremberg because the Nuremberg Tribunal held that a higher law—international law—governed and controlled.

For me, Nuremberg remains a vivid memory that will live with me always. My role critically affected my impressions of Nuremberg for, in developing the case against Milch, I saw overwhelming evidence of the Nazis' massive slave labor program and its excesses. I also saw, through the hard evidence from Nazi records, the devastating effects on human beings of the human experimentation program that the Nazis executed at the Dachau concentration camp. I thought that these experiments, which Milch allegedly authorized, were in fact experiments in sadism. As an American lawyer at Nuremberg I saw first hand the effects of a regime that had cast aside the rule of law and where the rule of a single despot, Adolf Hitler, governed the destiny of his German subjects and of others within his conquered domain.

I walked through ruins on the way to the courthouse from the Grand Hotel where I was living. Daily, I saw the effects of Hitler's aggressions on his own people. After I arrived at the courthouse, I saw from the Nazis' own files the death and destruction that they had wrought on humanity. All this affected me deeply and I knew in my heart there must be a better way. I felt within me a sense of mission to bring about that better way. Of course, this means establishing the rule of law in a world where all individuals can live in peace, security, and justice.

Nuremberg gave my life a sense of meaning and purpose, and I became an individual there. Individuals made a difference at Nuremberg—those individuals who took time off from their climb upward on the ladder of worldly success to do something for humanity. I resolved never to let horrors like those of Nazi Germany happen again, and I have devoted my life to that quest. To preserve the achievements of Nuremberg, we must establish a permanent structure. For example, the European Union has survived the winds of turbulence and change because it has a structure in place, and nations and individuals abide by its rules because they know what they are. An international criminal court with powers of enforcement to carry out its decisions would deter those minded to transgress rules defining international criminal conduct.

Nuremberg was right and it was just. Let it be a beacon light for the world to see and revere now and for eternity—to ensure a better future for all of us. As Edwin Dickinson, that great internationalist, said some years ago: "History teaches that without ideals there can be no progress, only change. The stars that guide you may never touch with your hands, but 'following them you will reach your destiny.'"¹⁰ Let us all today tithe a bit for future humanity in an endeavor to create for future generations a more secure world in which the rule of law prevails and a lasting peace is institutionalized.

10. Edwin D. Dickinson, *Progress: The Middle Way*, 1953 AM. SOC'Y INT'L L. PROC. 2, 7.

